FEB 21 2000

(12)

SUPREME COURT, U.S.
FILED
FEB 21 2001
CLERK

No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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DESIGNATION OF CORPORATE RELATIONSHIPS

There are no corporate parties, and, accordingly, no designation of corporate relationships pursuant to Supreme Court Rule 29.6 is required.

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SUMMARY OF ARGUMENT

This case presents a single question: whether, in requiring prisoners to exhaust "such administrative remedies as are available," Congress intended to require a prisoner to exhaust an administrative remedy that does not permit the recovery of monetary damages, where the prisoner alleges that he was beaten by prison guards and seeks monetary damages to remedy his injuries. In his opening brief, petitioner Timothy Booth showed that the plain language of 42 U.S.C. § 1997e(a), the administrative law principles against which Congress adopted that language, and the statutory history of prisoner exhaustion requirements all lead to the same conclusion – that § 1997e(a) does not require a prisoner who seeks only monetary damages to remedy a past constitutional violation to exhaust administrative remedies where monetary damages are not available under the prison's grievance procedure.[1]

In response, respondents exert considerable effort arguing that § 1997e(a) is an unqualified mandatory exhaustion statute, that there is no futility exception to such a statute, and, accordingly, that courts have no discretion to excuse a prisoner's failure to exhaust administrative remedies. But Mr. Booth's argument is not based on a futility exception. Rather, his argument is based on

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[1] Both the United States and 50 states and territories filed briefs *amicus curiae* in support of respondents. Many of the arguments in the *amici* briefs mirror those in respondents' brief. For simplicity, we refer to "respondents" when we address arguments that respondents make either alone or along with an *amicus*, and to the particular *amicus* when we address arguments that the particular *amicus* makes alone. We cite the Brief for the United States as *Amicus Curiae* Supporting Respondents as "United States Am. Br." and the Brief of 50 States and Territories as *Amicus Curiae* in Support of the Respondents as "States Am. Br."

the plain language of § 1997e(a) – that an administrative procedure that cannot give the relief sought is not a "remed[y]" that is "available," and so, under the express language of § 1997e(a) (not under any judicially-created exception), no exhaustion is required. While respondents may have preferred Congress to have enacted an unqualified exhaustion statute, it did not do so.

When they turn to the express language of § 1997e(a), respondents essentially concede, as they must, that the phrase "such administrative remedies as are available" imposes some limitation on what must be exhausted. But respondents view that limitation as meaning that the grievance procedure only must address the general subject matter of the prisoner's complaint for exhaustion to be required, without regard to whether the procedure can remedy the wrong or provide relief. Not only is respondents' interpretation of the statutory language strained, but in their concession that § 1997e(a) is not unqualified, respondents call into question their policy-based arguments about the importance of a "bright-line" rule to the purposes of the Prison Litigation Reform Act ("PLRA") and to prison administration.

Having conceded that § 1997e(a) does not require that all prison complaints first be exhausted, respondents rely almost exclusively on Congress's deletion of the word "effective" from the prior version of the statute to support their argument that an administrative procedure that cannot provide the relief sought is nonetheless an "available remedy" that must be exhausted. But the meaning that respondents place on the word "effective" is belied by the terms of the prior statute itself. Moreover, the support that respondents offer for that meaning (a Department of Justice regulation and *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992)) does not bear the considerable weight that respondents would place upon it.

Finally, respondents assert that a broad exhaustion rule best serves the purposes of the PLRA. However, in addition to having already cast doubt on this argument through their concession that § 1997e(a) does not (indeed, cannot) require exhaustion in every case, respondents greatly overstate the practical benefits of exhaustion of prison grievance procedures in the present circumstances and understate the practical costs.[2]

ARGUMENT

I. MR. BOOTH'S ARGUMENT RELIES ON THE PLAIN LANGUAGE OF 42 U.S.C. § 1997e(a) AND NOT ON A PURPORTED EXCEPTION TO THE STATUTE.

Respondents exert considerable effort arguing that, "where Congress has specifically required exhaustion, the courts may not interpose a 'futility' exception." Resp't Br., at 33. *See also id.* at 33-40; United States Am. Br., at 16-17. Respondents are refuting an argument that Mr. Booth has not made.

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[2] As the United States points out in its *amicus* brief, *see* United States Am. Br., at 10, Mr. Booth's complaint included claims for both monetary and other relief. However, the district court could have dismissed his non-monetary claims for failure to exhaust and allowed him to proceed with his monetary damages claims. *See, e.g., Miller v. Menghini*, 213 F.3d 1244, 1246 (10th Cir. 2000). This is, in effect, the result that occurred when Mr. Booth was transferred out of Smithfield prison, thereby mooting his claims for non-monetary relief. *Cf. Mathews v. Diaz*, 426 U.S. 67, 75 (1976) (holding that 42 U.S.C. § 405(g)'s jurisdictional requirement of filing a benefits application with the relevant administrative agency could be satisfied after filing of the complaint or even when the case was on appeal).

It is axiomatic that "exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute," *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989), and that the courts may not create an exception to a statutory exhaustion requirement "where Congress has declined to do so," *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989). Mr. Booth does not take issue with these obvious propositions. The fallacy in respondents' argument is that it presupposes the answer to the central question in this case: whether, by requiring prisoners to exhaust only "such administrative remedies as are available," Congress has mandated the exhaustion of prison grievance procedures that cannot provide the relief sought by a prisoner.

Respondents argue that Mr. Booth's plain language argument misapprehends the relevant case law, Resp't Br., at 33-40; *see also* United States Am. Br., at 16-17, but it is respondents who miss the point. Mr. Booth cited numerous cases involving administrative exhaustion, some based on explicit statutory commands (*see, e.g., Bowen v. City of New York*, 476 U.S. 467 (1986); *Weinberger v. Salfi*, 422 U.S. 749 (1975)); others based on implicit exhaustion requirements (*see, e.g., Reiter v. Cooper*, 507 U.S. 258 (1993)); and yet others without a statutory basis at all (*see, e.g., Clayton v. International Union, UAW*, 451 U.S. 679 (1981); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963)). *See* Pet'r Br., at 23-27.

But the existence of a statutory scheme in those cases is beside the point: Mr. Booth relies on these cases to show that, when Congress chose to limit the exhaustion requirement to "such administrative remedies as are available," rather than to create an unqualified exhaustion requirement, it did so against the backdrop of these administrative exhaustion decisions, both statutory and otherwise, including the general rule in § 1983 actions that exhaustion is not required absent a specific statutory

requirement. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982). *See* Pet'r Br., at 23-24. Indeed, in adopting this language in 1980, and in preserving it when it amended the statute in 1996, there is no indication that Congress "decisively rejected the traditional approach" to exhaustion. United States Am. Br., at 16. To the contrary, Congress wrote and maintained the language "such administrative remedies as are available," signaling its rejection of the unconditional rule that respondents would have preferred.

Indeed, as well illustrated by the very cases upon which respondents rely, *see* Resp't Br., at 38-39, Congress just as easily could have enacted an unequivocal, unqualified statutory exhaustion requirement – without the limitation "such administrative remedies as are available." *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 756 (1975) ("No action . . . shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." (alterations in original)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 25-26 (1989) ("[n]o action may be commenced under [the citizen suit provision of RCRA] prior to sixty days after the plaintiff has given notice of the violation" to the federal and state governments and the alleged violator of RCRA); *McNeil v. United States*, 508 U.S. 106, 107 n.1 (1993) ("An action shall not be instituted [under the FTCA] . . . unless the claimant shall have first presented the claim to the appropriate Federal agency. . . .").

While respondents argue that the language of the statutes at issue in these cases is "similar" to the language of § 1997e(a), Resp't Br., at 38, in fact the opposite is true: not one of those statutes contained any limiting language in the way that § 1997e(a) does. Had Congress intended to enact a "similar" unqualified statute, it would have drafted § 1997e(a) like the statutes at issue in *Weinberger*, *Hallstrom*, and *McNeil*, to read, "No action shall be brought . . . until administrative procedures are

exhausted." Thus, what respondents' cases illustrate is that when Congress wants to adopt an unqualified exhaustion rule, it is quite capable of doing so, yet it did not do so here. In this fundamental respect, respondents' cases actually support Mr. Booth's argument, not their own.[3]

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[3] The other case upon which respondents rely, *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), also is distinguishable. Respondents cite *Shalala* for this Court's rejection of the argument that a plaintiff could avoid a required administrative procedure simply because the relevant agency "might not provide a hearing for [a] *particular contention*" of the plaintiff's. *Id.* at 23 (emphasis in original). Yet, Mr. Booth does not argue that he need not exhaust administrative remedies because the prison authorities will ignore one of the arguments in support of his claim. Rather, the prison grievance system cannot address his claim *at all*, because he seeks a specific remedy – monetary damages to remedy a past, completed constitutional violation – that is unavailable through that process.

In addition, respondents' quotation from *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), obscures the substantial differences between that case and this one. While the Court did indicate that administrative exhaustion generally is required even though a party challenges an administrative body's subject-matter jurisdiction over the dispute, *see id.* at 50-51, the party challenging the administrative body's power in *Myers* was not the aggrieved party, but the defendant. In *Myers*, the party seeking relief and the administrative body agreed that the administrative body had the power to issue the relief sought, but the respondent in the administrative action sought an injunction to prevent the administrative body from holding a hearing on the matter. *See id.* at 43. In contrast, here, Mr. Booth does not seek to enjoin any ongoing administrative proceedings brought against him, and, significantly, both he and the Pennsylvania Department of Corrections agree that the prison grievance system could *not* have provided him with the remedy he sought.

II. RESPONDENTS' READING OF § 1997e(a) IS STRAINED AND INCONSISTENT WITH THE VERY PURPOSES OF THE POLICIES THAT RESPONDENTS ADVANCE.

Notwithstanding their mischaracterization of § 1997e(a) as establishing a "broad rule . . . requiring exhaustion in all cases," Resp't Br., at 12; *see also* United States Am. Br., at 13 ("broad and categorical exhaustion requirement"), and their criticism of Mr. Booth for reading an "exception" into the statute, Resp't Br., at 33-40; United States Am. Br., at 16-17, 23, when respondents actually address the phrase "such administrative remedies as are available," they concede that it does not, in fact, "requir[e] exhaustion in all cases." But in respondents' view, the meaning of that phrase, and the limit on what must be exhausted, is simply that the grievance procedure must "address the subject matter of [the prisoner's] complaint." Resp't Br., at 20; *see also id.* at 10 ("address [the prisoner's] complaint"); United States Am. Br., at 11 ("address the kind of problem identified by the inmate's complaint"); States Am. Br., at 7 ("addresses the problem that a prisoner raises"). Respondents' interpretation of the pivotal phrase not only is less natural and more strained than Mr. Booth's, but it is less workable and in sharp conflict with respondents' own policy-based arguments.

Significantly, the statute does not use the words "address" or "subject matter," but it does use the words "remedy" and "available," words that focus specifically on what benefits will accrue to the complaining party. As the United States itself acknowledges, "[t]he term 'remedy' means 'the legal means to recover a right or to prevent or obtain redress for a wrong,' and 'available' means 'capable of use for the accomplishment of a purpose.' " United States Am. Br., at 11 (quoting *Webster's Third New International Dictionary* 1920, 150 (1993)). Respondents offer no basis for

ignoring the plain meaning of the terms Congress chose to use or for grafting the terms "address" or "subject matter" onto the statute. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 121 S. Ct. 513, 519 (2000) ("Because the [statute] does not define 'a final decision with respect to an arbitration' or otherwise suggest that the ordinary meaning of 'final decision' should not apply, we accord the term its well-established meaning.").

Moreover, respondents' interpretation of the statute is inconsistent with their urging that "the across-the-board exhaustion mandated by Congress provides a bright-line rule that benefits courts, prisoners and prisons alike." Resp't Br., at 31. Once respondents concede that § 1997e(a) is not, in fact, an "across-the-board," "bright-line" rule, many of their policy-based arguments likewise fall by the wayside.

For example, while respondents assert that Mr. Booth's plain reading is contrary to Congress's intent to eliminate the case-by-case review that district courts engaged in under the former statute, *see* Resp't Br., at 26, their own reading of the statute also would require district courts to undertake a fact-intensive and time-consuming review of prisoner pleadings. Under Mr. Booth's reading, the court must inquire whether the remedy sought by the prisoner, such as monetary damages, is available through the administrative process. This rule is simple and bright-line: if the remedy is available, exhaustion is required; if it is not available, exhaustion is not required (because the statute does not command it). In contrast, under respondents' reading, rather than looking simply at the prisoner's request for relief, the court must parse the "subject matter of his complaint," a task surely more burdensome, especially for *pro se* prisoner complaints, than identifying the relief that the prisoner seeks. *See* Resp't Br., at 30 (discussing the "difficulties which face courts in dealing with prisoner complaints").

Related to respondents' contention that "available remedy" means "capable of addressing the subject matter" of the prisoner's complaint is respondents' refrain that the federal court should ignore prisoners' assertion of "the relief they prefer," Resp't Br., at 21, as this simply represents "the subjective desires of individual prisoners," or "what's in it for me?" States Am. Br., at 4, 8. *See also* United States Am. Br., at 7 ("the relief that the inmate would like").[4] Respondents' view that somehow a prisoner's assertion of a specific claim for specific relief to which s/he is legally entitled should be accorded less (or even no) weight than any other litigant's is unfounded.

Indeed, the assertion that a prisoner's "subjective" desire for particular relief should not determine whether a "remedy" is "available" is entirely inconsistent with the longstanding rule that a plaintiff is the master of his or her complaint. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). It also is inconsistent with § 1983, which, of course, provides for a damages remedy. *See City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future."). Moreover, what relief will be available in any given case is, in any event, dictated by the facts of the case, not by

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[4] The States as *amici* go even further, essentially asserting that the purpose of prisoner complaints is to improve prison conditions generally, not to provide redress for the particular wrong suffered by the prisoner. *See, e.g.*, States Am. Br., at 7 ("[A] remedy is available if it addresses the problem that a prisoner raises. It may not address it to his full satisfaction, or not to his satisfaction at all. In the unique context of prisons, however, a situation may be 'addressed' in the broader sense . . . even if it admittedly gives little solace to the grieving inmate."). The States' view that prisoners should, in effect, serve as emissaries of prison reform and that their "own particular pecuniary interests" should be ignored, *id.* at 8, is unprecedented.

the plaintiff's preferences. To suggest, then, that a prisoner's request for monetary relief (the only remedy available for a completed harm) is somehow manufactured or selfish and so should be disregarded has no support in law or logic, let alone in the language of the statute.

III. THE TERM "PLAIN, SPEEDY, AND EFFECTIVE" IN THE FORMER § 1997e(a) ADDRESSED THE PROCEDURAL FAIRNESS AND EFFICACY OF GRIEVANCE PROCEDURES, NOT WHETHER THE PROCEDURES COULD GRANT THE SUBSTANTIVE RELIEF SOUGHT.

To support their contention that a remedy is available even if it cannot redress the wrong or provide the relief sought, respondents place principal reliance on Congress's deletion of the word "effective" in the 1996 amendments to § 1997e(a). While Mr. Booth acknowledges that Congress expanded and significantly changed the exhaustion requirement through its amendments to § 1997e(a), he does not agree that Congress's deletion of the word "effective" undermines his argument. To the contrary, what the amended version of the statute left intact was the requirement that the "remedy" be "available" before exhaustion would be required. Where, as here, the remedy is not available, the prisoner need not exhaust.

The prior version of § 1997e gave district courts the discretion to continue state prisoner actions under § 1983 for a limited period of time in cases in which either the United States Attorney General had certified that the prison grievance procedure met minimum acceptable standards in providing "plain, speedy, and effective administrative remedies," or the district court found that the administrative remedies were "otherwise fair and effective." Even then, exhaustion was required only if a court determined that exhaustion would be "appropriate

and in the interests of justice." The 1996 amendments to § 1997e expanded the statute to include federal prisoners; deleted the Attorney General certification process; removed the district court's discretion to require exhaustion only if the grievance system was certified as "plain, speedy, and effective" or was "otherwise fair and effective"; and eliminated the district court's further discretion to require exhaustion as "appropriate and in the interests of justice."

The import of the deletion of the word "effective" must be judged in light of these major changes and the function the word "effective" served under the prior law. As Mr. Booth demonstrated in his opening brief, the term "plain, speedy, and effective" in the prior version of § 1997e was related to the procedural aspects of the grievance procedure at issue, and did not, as respondents contend, concern the substantive issue of whether the grievance procedure could remedy a wrong or grant appropriate relief. Rather, the term "such administrative remedies as are available" – which Congress retained when it amended the statute – addressed this substantive issue. As set forth in more detail in petitioner's opening brief, this is made clear from a review of the minimum standards in former § 1997e(b)(2) that a grievance procedure was required to meet before it could be deemed to be "plain, speedy, and effective," all of which involved procedural matters, and none of which related to whether, in fact, the grievance system could grant the relief sought. *See* Pet'r Br., at 35-39 & n.14.

Despite the clear statutory scheme tying the word "effective" to procedural, not substantive, matters, respondents insist that when Congress eliminated the word "effective," it meant to eliminate the substantive inquiry of whether the procedure could provide the relief sought. *See* Resp't Br., at 18-21; United States Am. Br., at 14-15. As support, respondents point to (1) the regulations promulgated by the Department of Justice under

§ 1997e(b),[5] and (2) *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), which involved § 1997e only by analogy. Neither supports respondents' argument.

The Department of Justice, charged under the 1980 version of § 1997e(b) with the task of establishing standards for the "implementation of a plain, speedy, and effective system for the resolution of grievances" in prisons, promulgated regulations that dealt primarily with the procedural aspects of administrative grievance systems. *See* 28 C.F.R. pt. 40 (2000). Respondents focus on one of these, 28 C.F.R. § 40.6, to support their argument that an "effective" remedy under the former § 1997e(a) was "one that provided for money damages." Resp't Br., at 20. Section 40.6 provided that "[t]he grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary." 28 C.F.R. § 40.6. Respondents also cite the Attorney General's commentary in promulgating the regulations that, "although monetary relief is desirable, it is not an essential component of a fair and effective grievance procedure." Resp't Br., at 15 n.14 (quoting 46 Fed. Reg. 3843, 3845 (Jan. 16, 1981)).

Contrary to respondents' assertion, the language in this regulation and commentary support petitioner's reading of the statute at least as much as it supports respondents'. Under § 40.6, while certain "remedies" might be "available" through the prison grievance procedure, the procedure still might not be effective (because it might not provide "a reasonable range of meaningful remedies"). Moreover, the commentary separates out the

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[5] Significantly, the United States does not advance the argument pressed by respondents with respect to the Department of Justice regulations.

availability of "monetary relief" (indicating it was "desirable," but not "essential") from an "effective grievance procedure." These provisions thus suggest that the Attorney General considered that a grievance procedure without money damages still could be "fair and effective," and, conversely, that a grievance procedure with a range of available remedies (including, presumably, money damages) might not meet the requirements of an effective procedure. In short, even under the regulation upon which respondents rely, the *availability* of money damages was not tied to the *effectiveness* of a grievance procedure, and Congress's elimination of the "plain, speedy, and effective" requirement left untouched the prerequisite – in the former statute *and* the current one – that a remedy be "available" before exhaustion is required.

In addition to relying on the Department of Justice's regulation, respondents focus on *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). Specifically, respondents cite one sentence in *McCarthy*, in which the Court noted that, "in contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, [§ 1997e] conditions exhaustion on the existence of 'effective administrative remedies.' " *Id.* at 150. From this sole reference, respondents make a giant leap and conclude that the word "effective" in the prior statute "implied provision for money damages, at least where money damages was the only relief a prisoner sought." Resp't Br., at 17. *See also* United States Am. Br., at 13-15.

Of course, as respondents acknowledge, *see* Resp't Br., at 17, the discussion in *McCarthy* of the term "effective" was *dicta*. In fact, the meaning of the term "effective" in the prior statute was not mentioned in the lower court opinion in *McCarthy*, and was not raised, briefed, or otherwise argued before this Court, thereby rendering respondents' reliance on *McCarthy* for this point all the more suspect. Moreover, the Court in *McCarthy* never

reached the meaning of the word "available," and so did not address whether a grievance procedure that refused to permit an award of monetary relief provided an "available" "remedy" under § 1997e(a). *See Shalala*, 529 U.S. at 41 (Thomas, J., dissenting) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))). Merely because the Court's *dicta* mentioned the term "effective" does not mean that the Court would have found the remedy sought by the prisoner "available."[6]

IV. RESPONDENTS' POLICY-BASED ARGUMENTS ARE PROPERLY ADDRESSED TO CONGRESS, NOT TO THIS COURT, AND ARE OVERSTATED.

Respondents focus on policy issues in their brief, arguing that requiring exhaustion even when the remedy sought by the prisoner is not available will facilitate prison administration and further the purposes of the PLRA. *See* Resp't Br., at 27-33; United States Am. Br., at 18-23; States Am. Br., at 16-19. Of course, the task for this Court is to interpret the

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[6] In fact, another part of the Court's opinion in *McCarthy* suggests that the Court viewed the words "available" and "remedy" as meaning capable of providing the relief the prisoner sought. In response to the Bureau of Prisons' argument that, "despite the absence of any provision in the general grievance procedure for the award of money damages, such damages in fact are *available* for most prisoners asserting *Bivens* claims," the Court stated, "[t]he *availability* of a money damages *remedy* is, at best, uncertain, and the uncertainty of the administrative agency's authority to award relief counsels against requiring exhaustion." *McCarthy*, 503 U.S. at 154-55 (emphasis added).

statute, not to make policy. For better or worse, while certainly broadening the exhaustion requirement in 1996, Congress chose not to make it unqualified, but, rather, to limit it to "available" "remedies." As this Court recently stated, "it is not the province of this Court to rewrite the statute. . . . We hold as we do because respondent's view seems to us the only permissible interpretation of the text – which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000).

Furthermore, the policy arguments that respondents make are least compelling in a case such as this, where the prisoner seeks money damages as compensation for having been beaten by prison guards – a past, completed constitutional violation. This conclusion is reinforced by Congress's restriction of the exhaustion requirement in § 1997e(a) to actions "with respect to prison conditions," which arguably does not even encompass excessive force or intentional assault claims brought by a prisoner against individual guards. *See Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *petition for cert. filed*, No. 00-853 (U.S. Nov. 22, 2000). *But see Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000).

In addition, respondents' policy arguments in support of exhaustion ignore the heavy burdens placed on prisoners, such as the likelihood of unrepresented prisoners missing the typically truncated grievance procedure filing deadlines and suffering the dismissal of their subsequent federal claims. *See McCarthy*, 503 U.S. at 152-53; *see also* Pet'r Br., at 33-34; American Civil Liberties Union *et al.* Am. Br., at 3, 12-13. Prisoners also face the risks of being prevented from exhausting the grievance system by virtue of being transferred or placed in some type of restrictive housing, or having their grievance barred under vaguely-worded restrictions regarding "abuse" or "misuse" of the system. *See* American Civil

Liberties Union *et al.* Am. Br., at 3, 14-20. But even putting aside these obvious problems with respondents' position, their policy-based arguments are overstated in any event.

First, requiring exhaustion of procedures that cannot provide relief will not "promote[ ] the resolution of prison disputes outside of litigation." Resp't Br., at 29. It is not possible for a system that does not provide monetary damages to "resolve" a dispute as to whether monetary damages are to be awarded. Moreover, respondents offer no support for their assertion that a plaintiff might accept alternative relief. In fact, the acceptance of an unsolicited remedy in lieu of damages is particularly unimaginable where, as here, a prisoner is complaining of a past assault for which no form of relief other than monetary damages is available or appropriate.

Respondents' argument that "administrative proceedings can help to clarify, narrow and focus issues for a court," Resp't Br., at 29, fares no better. First, this Court in *McCarthy* expressly rejected the notion that a prison grievance procedure provides a formal factual record for use by a court. *See McCarthy*, 503 U.S. at 155-56. Indeed, the idea that the prison grievance system could provide a useful factual record is largely a myth because most prison grievance systems do not even make a written report in cases where the prisoner is seeking relief that the system does not provide. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement*, 86 Cornell L. Rev. 483 (forthcoming March 2001) (manuscript at 134-35).[7]

Moreover, in Pennsylvania, at least, the purported fact-finding benefit that respondents identify is illusory. As Mr. Booth noted in his opening brief (a point to which

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[7] This article was lodged with the Clerk of the Court with the Brief of the American Civil Liberties Union *et al.* as *Amici Curiae* in Support of Petitioner.

neither respondents nor their *amici* responded), the Pennsylvania grievance procedure at issue here provides that all grievance system proceedings are "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee." 51Ja. Thus, the grievance process in Pennsylvania by definition cannot serve a fact-finding role for later judicial proceedings.

Respondents also argue that administrative procedures are useful to put prisons on notice of problems. Resp't Br., at 30. While there can be no doubt that there is a benefit to prisons knowing of problems, respondents' argument goes too far because, in fact, Congress chose not to require exhaustion in all cases, but only in cases where the prison can provide a remedy. In any event, there is no evidence that an administrative grievance will put prisons on notice of problems any better than will a complaint in court, or that instances of serious misconduct will go undetected by prison officials. In fact, one could just as easily argue that a complaint will more quickly and effectively attract the prison's attention and lead to the resolution of problems than will a grievance for which the prison can do nothing in response.

Respondents' further argument that Mr. Booth's approach "would enable prisoners to bypass administrative processes at will," Resp't Br., at 32, is belied by the available empirical evidence. First, a prisoner, like any other plaintiff, may sue for a variety of remedies and there is no reason to believe that the prisoner with meritorious injunctive claims will abandon them completely simply to "get to court" as soon as possible. To the contrary, given that filing a complaint costs money (even under the 28 U.S.C. § 1915(b) *in forma pauperis* installment plan) and may cost the *in forma pauperis* prisoner plaintiff one of his or her three lifetime "strikes" under 28 U.S.C. § 1915(g), a prisoner will be particularly circumspect in bringing a lawsuit, particularly if, in fact, the problem of

which s/he complains can be remedied through the prison grievance system.

Moreover, despite respondents' cries of alarm that a plain reading of the statute will lead to a flood of prisoner suits as plaintiffs manipulate their complaints to seek only monetary damages, the evidence belies this assertion. In the two years after the Fifth and Ninth Circuits held that prisoners need not exhaust administrative remedies that could not provide the relief they sought,[8] filings of civil rights complaints by prisoners in those circuits dropped 4.9 and 8.4 percent respectively, while total filings of prisoner civil rights complaints in all federal courts dropped only 3.6 percent. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2000 Report of the Director, tbl. C-3; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1998 Report of the Director, tbl. C-3. Certainly, these numbers call into doubt the validity of respondents' unsupported assertion that prisoners will evade the exhaustion requirement and flood the federal courts with damages-only claims.[9]

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[8] *See Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998); *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998).

[9] The United States argues that requiring administrative exhaustion even when the remedy sought is not available will further the statutory purpose of reducing the volume of frivolous prisoner litigation because (1) a prisoner who "diligently pursues" the prison grievance system is less likely to file a frivolous complaint, and (2) a prisoner who files a grievance and receives a negative response "may well be persuaded that the claim lacks sufficient merit to pursue in court." United States Am. Br., at 19. However, there is no reason to infer that the merits of a prisoner's complaint is connected to the prisoner's willingness to go through the grievance procedure (particularly where no available remedy exists under

CONCLUSION

For the foregoing reasons and for those set forth in petitioner's opening brief, petitioner Timothy Booth respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit and remand for further proceedings under which the district court is required to consider the merits of Mr. Booth's complaint.

Respectfully submitted,

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that procedure). Furthermore, it is unlikely that a prisoner receiving an unfavorable grievance response will forgo his or her claim where, as here, that response is based not on the merits of the grievance, but on the fact that the grievance procedure could not provide the relief sought.

Moreover, as Mr. Booth demonstrated in his opening brief, other provisions of the PLRA specifically provide federal courts with the authority to dismiss frivolous cases quickly without addressing the exhaustion issue. *See* Pet'r Br., at 42-43 & n.17. Given these other provisions, the exhaustion requirement will not reduce the volume of frivolous lawsuits.